Supreme Court, U.S.
FILED
APR 28 1997
OFFICE OF THE CLERK

(2)

No. 96-1361

In the Supreme Court of the United States

OCTOBER TERM, 1996

ROBERT E. GRIJALVA, PETITIONER

v.

DEPARTMENT OF INTERIOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

WALTER DELLINGER
Acting Solicitor General
FRANK W. HUNGER
Assistant Attorney General
DAVID M. COHEN
HILLARY A. STERN
Attorneys
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

10 pp

QUESTION PRESENTED

Whether the court of appeals correctly upheld the Merit System Protection Board's determination that petitioner failed to prove that he made a disclosure protected by the Whistleblower Protection Act, 5 U.S.C. 2302(b)(8)(A).

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	4
Conclusion	7

TABLE OF AUTHORITIES

Statute:

Whistleblower Protection Act, 5 U.S.C. 2302(b)(8)(A) 3, 5, 6

In the Supreme Court of the United States

OCTOBER TERM, 1996

No. 96-1361

ROBERT E. GRIJALVA, PETITIONER

v.

DEPARTMENT OF INTERIOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The order of the court of appeals (Pet. App. 47), which affirmed the decision of the Merit Systems Protection Board (MSPB), is unreported. The opinion of the MSPB (Pet. App. 44-46), which denied the petition for review, is unpublished but is noted at 71 M.S.P.R. 567 (Table). The Initial Decision of the MSPB Administrative Judge (Pet. App. 1-43) is unreported.

JURISDICTION

The order of the court of appeals was entered on November 25, 1996. The petition for a writ of certiorari was filed on February 24, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner served as a supervisory and review appraiser in the Department of the Interior's Phoenix Area Office of the Bureau of Reclamation. Pet. App. 2. In that capacity, petitioner supervised subordinate appraisers and reviewed the appraisals performed by both agency and independent appraisers. *Ibid.* In February 1994, the agency began proceedings to remove petitioner from his position based on his failure to coordinate disclosure of confidential and privileged information, repeated failures to follow instructions, failure to cooperate with the United States Attorney, insubordination, misuse of government resources, misrepresentation of facts, and impeding the efficiency of the agency. *Id.* at 2-3. Petitioner challenged his dismissal before the MSPB. Following a two-day hearing, the MSPB administrative law judge affirmed the agency action in all respects. *Id.* at 2.

1. The charge that petitioner failed to coordinate disclosure of confidential and privileged information arose out of petitioner's review of an appraisal of a property owned by Zane and Donna Johnston. Pet. App. 3, 5. In preparation for litigation regarding condemnation of the Johnston property, the United States Attorney for the District of Arizona hired Con Englehorn, an independent appraiser, to serve as an expert witness and to prepare an appraisal of the property. *Id.* at 5. Englehorn's appraisal was submitted to petitioner for review. *Ibid.* The Englehorn appraisal included in its valuation the worth of several structures that were not located on the property. *Id.* at 28. The precise property lines of the Johnston property were unclear, requiring a

detailed survey. *Id.* at 31. In an earlier proceeding, petitioner had hired another outside appraiser to conduct an appraisal of the property. That appraisal, like the Englehorn appraisal, mistakenly included the off-site structures. *Ibid.*

After reviewing Englehorn's appraisal of the Johnston property and discovering the mistaken inclusion of the off-site structures, petitioner filed a complaint against Englehorn with the Arizona State Board of Appraisal, asserting that in his appraisal, Englehorn violated an ethics provision, specific appraisal standards, and state law. Pet. App. 6. Petitioner did not notify the United States Attorney that he had filed a complaint against its expert. *Ibid.*

In removing petitioner from his position, the agency charged that petitioner improperly disclosed confidential information in his complaint against Englehorn. The complaint included detailed descriptions of Englehorn's appraisal, which was prepared for use during litigation. Pet. App. 7. In addition, petitioner's disclosure severely prejudiced the United States Attorney in the prosecution of the Johnston condemnation litigation, forcing the government to delay the proceedings, hire another expert witness, and commission a new appraisal. *Ibid.*

2. Petitioner challenged his dismissal in part on the ground that the disclosure of the Englehorn appraisal was protected by the Whistleblower Protection Act (WPA), 5 U.S.C. 2302(b)(8)(A). That provision prohibits federal agencies from taking personnel action against employees for disclosing information that the employee "reasonably believes evidences * * * a violation of any law, rule, or regulation, or * * * mismanagement, a gross waste

of funds, an abuse of authority, or a substantial and specific danger to public health or safety."

The administrative law judge concluded that petitioner lacked a reasonable belief that the Englehorn appraisal evidenced any of the abuses outlined in the WPA. Pet. App. 30-36. In reaching that conclusion, the ALJ relied on petitioner's extensive experience as an appraisal reviewer, his knowledge of the previous appraisal that included the same error, and his awareness of the difficulties involved in determining the Johnston property lines. In addition, petitioner admitted that he lacked evidence of any statutory violation and acknowledged that he knew that the Englehorn appraisal was going to be reviewed by others in the agency before being authorized for use in the condemnation proceedings. The ALJ also found that petitioner knew that the agency believed that it was legally obligated to compensate the owner of the structures regardless of whether they were located off-site. *Ibid.*

3. On October 9, 1995, the MSPB denied petitioner's petition for review of the ALJ findings. Pet. App. 44-46. On November 25, 1996, the Federal Circuit affirmed the MSPB decision. *Id.* at 47.

ARGUMENT

The court of appeals correctly affirmed the MSPB's decision to sustain petitioner's removal. The holdings below are essentially fact-specific and do not conflict with any decision of this Court, another court of appeals, or any statute or regulation.

Under the WPA, the government may not take employment action as a reprisal against an employee who discloses information that the employee "reasonably believes" manifests a violation of statute or

regulation, or otherwise represents a form of abuse. 5 U.S.C. 2302(b)(8)(A). Petitioner argues (Pet. 12-13) that, in determining whether he had a reasonable belief that the Englehorn appraisal evidenced one of the abuses described in the WPA, the ALJ improperly focused on petitioner's subjective motivation. According to petitioner (Pet. 14-17), the WPA protects employees who disclose information based on a reasonable belief that the disclosure evidences a violation of law, regulation, or other abuse, even if the employee did not actually hold that belief. That argument is both incorrect as a matter of law and inapplicable to the findings in this case.

Nothing in the ALJ decision purports to apply a subjective test under the WPA. Indeed, petitioner acknowledges that the ALJ "avoided express findings that [petitioner] was ill-motivated toward Englehorn." Pet. 12. Instead, petitioner cites (*ibid.*) a portion of the decision in which the ALJ noted that petitioner had not filed a complaint against the appraiser who conducted the earlier appraisal of the Johnston property, an appraisal that included the same error as Englehorn's. Although petitioner argues (Pet. 13) that that portion of the decision suggests that petitioner was motivated by a desire "to get Englehorn," the cited portion of the decision simply makes the point that the error in the Englehorn appraisal was an innocent one, given that another appraiser had made the same mistake. Thus, nothing in the ALJ decision refers to, let alone relies on, petitioner's subjective motivation in filing the complaint against Englehorn.

Moreover, even if the ALJ did inquire into petitioner's subjective motivation, that inquiry is not barred by the WPA. As the government argued below,

"[t]he word 'reasonably' is an adverb modifying the word belief, but it is the employee who must hold the (reasonable) belief." Pet. 13. Under the WPA it is not enough that a disclosure be based on a *conceivable* reasonable belief. Rather, the WPA protects an employee who himself "reasonably believes" that disclosed information manifests one of the abuses described in 5 U.S.C. 2302(b)(8)(A). In protecting disclosures based on such a reasonable belief, the WPA requires both that the employee actually hold such a belief and that the belief be reasonable.

Finally, even if we assume that the ALJ did inquire into petitioner's subjective beliefs and that it was improper to do so, that alleged error could not have affected the outcome of this case because the ALJ also found that there was no objectively reasonable belief to support the conclusion that the Englehorn appraisal manifested a violation of law, regulation, or rule, or otherwise amounted to abuse. Pet. App. 30-35. The record before the ALJ contained substantial evidence to support that conclusion, and petitioner does not challenge that conclusion in his petition for certiorari. Given the uncontested finding that petitioner lacked an objectively reasonable belief that the Englehorn appraisal evidenced one of the abuses described in 5 U.S.C. 2302(b)(8)(A), the court of appeals did not err in affirming the MSPB.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WALTER DELLINGER
Acting Solicitor General
FRANK W. HUNGER
Assistant Attorney General
DAVID M. COHEN
HILLARY A. STERN
Attorneys

APRIL 1997